STATE OF MICHIGAN

COURT OF APPEALS

ROSA RITA STANEK,

Plaintiff-Appellant,

v

BRIAN T. HEBERT and KATHLEEN HEBERT,

Defendants-Appellees,

and

ALBERT CIESZYNSKI and PATRICIA CIESZYNSKI,

Defendants.

UNPUBLISHED
June 13, 1997

No. 189830
Macomb Circuit Court
LC No. 93-005534-CH

Before: Reilly, P.J., and Wahls and N.O. Holowka*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court judgment denying her claim for an easement over defendants' land. We affirm.

Plaintiff lives in a subdivision where all landowners were granted an easement allowing use of a canal. Plaintiff, whose land does not abut the canal, argued that she was entitled to an easement over defendants' respective lots so she could reach the canal. The parties do not dispute that plaintiff is entitled to use the canal. The issue is whether she is entitled to an easement over defendants' land to reach the canal. Although plaintiff's complaint did not specify the type of easement she sought, she has appealed from that part of the court's decision that denied her a prescriptive easement.

Outhwaite v Foote, 240 Mich 327, 329; 215 NW 331 (1927), sets forth some of the elements of an easement by prescription, particularly adverse user:

---

* Circuit judge, sitting on the Court of Appeals by assignment.

"Prescription is founded upon the supposition of a grant. The use or possession to support it must be adverse, or of such a nature as indicates that it is claimed as a right. Permission is insufficient.

"'Adverse user is defined as such a use of the property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right.' 9 RCL pp 776, 777.

"It must be exclusive in the sense that the right does not depend upon a like right in others. *First National Bank v VandenBrooks*, 204 Mich 164 [169 NW 920 (1918)].

As to the claim of right element, the *Outhwaite* Court adopted the following:

"'The rule that a permissive user will not ripen into an easement by prescription does not, however, apply where there has been an attempt to grant the easement which is void because of the statute of frauds.' 9 RCL p 779." 240 Mich at 332.

In order to establish the above, the "evidence of adverse user must be clear." *Hopkins v Parker*, 296 Mich 375, 380; 296 NW 294 (1941). Further, "the burden of proving the existence of the easement is upon the claimant thereof." *Stewart v Hunt*, 303 Mich 161, 163; 5 NW2d 737 (1942). [*Cheslek v Gillette*, 66 Mich App 710, 713-714; 239 NW2d 721 (1976).]

The claim against Mr. and Mrs. Cieszynski was dismissed pursuant to an unopposed motion for directed verdict at the close of plaintiff's proofs and is not involved in this appeal. As to the claim against Mr. and Mrs. Hebert, the court found that the necessary element of continuous use had not been shown. On appeal, plaintiff argues that the court's ruling was erroneous because the court did not "tack on" the usage by plaintiff's predecessors in interest to attain the requisite fifteen years' continuous use of the easement. We review the court's decision de novo and will not disturb the findings of the circuit court unless, after examining the entire record, we conclude that we would have reached a different result. *Cheslek, supra*, at 713.

The court's determination that plaintiff did not show continuous use was based on ambiguous, uncertain and indeterminate proofs of the claimed easement's route and evidence that plaintiff used the *canal* for fewer than fifteen years. In particular, the claimed easement was used for approximately twelve years to reach a docked or anchored boat owned or used by plaintiff's then-husband and predecessors in interest. After plaintiff's divorce, however, the boat was removed and she and her children did not use the canal, although they used the claimed easement to reach the canal's bank to watch ducks. If this additional use is considered, plaintiff's use of the path leading to the canal would exceed fifteen years.

It is arguable whether plaintiff is entitled to an easement to watch ducks, considering that her entire claim is based on the subdivision landowners' rights to use the canal as a canal. That right does

not necessarily include the right to use lands abutting the canal for purposes other than to access the water. See *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957); *Jacobs v Lyon Twp (On Remand)*, 199 Mich App 667; 502 NW2d 382 (1993).

Nonetheless, the court did not rely solely on the use of the canal, but also presented an alternative basis for rejecting plaintiff's claim to a prescriptive easement. It found that plaintiff failed to show continuous use of the specific path over which she claimed an easement. The proofs showed that, over the years, plaintiff and her predecessors did not necessarily follow the same path across the Heberts' property. Although they often followed a path approximately three feet wide extending from a telephone pole to the canal where it abutted the Heberts' property,[1] they also testified that they had to cut across a corner of the Cieszynskis' property; they sometimes took a different route over the Heberts' property if the lawn was cut; they sometimes went to the canal where it abutted the Heberts' property; and they sometimes went to the canal where it abutted the Cieszynskis' property. This testimony was couched in terms of approximations and aging recollections. In essence, the proofs were too "ambiguous, uncertain and indeterminate to afford the necessary data for a favorable decree." *Fox v Pierce*, 50 Mich 500, 505; 15 NW 880 (1883).

The circuit court did not expressly reject plaintiff's argument that she was entitled to "tack on" the use of her predecessors in interest to reach the fifteen-year requirement for a prescriptive easement. Had the court expressly rejected plaintiff's argument, we would find no error. To entitle a property owner to "tack on" the use of prior owners, it must be shown that the easement was (1) expressly included in each written conveyance or (2) the subject of a parol reference at the time of each transfer. *Siegel v Renkiewicz Estate*, 373 Mich 421, 425-426; 129 NW2d 876 (1964); *Von Meding v Strahl*, 319 Mich 598; 30 NW2d 363 (1948). Plaintiff's proofs showed neither.

The circuit court did not err when it found that plaintiff had failed to prove a prescriptive easement.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Myron H. Wahls
/s/ Nick O. Holowka

[1] The record on appeal does not disclose the precise location of the pole.